

December 5, 2018

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street S.W.
Room TWA325
Washington, DC 20554

**Re: Notice of *Ex Parte* Presentation
CG Docket No. 02-278, WC Docket. No. 18-213**

Dear Ms. Dortch:

On December 3, 2018, Mike Merola and Michael McMenemy of Winning Strategies Washington; Valerie Jewett of WellCare Health Plans, Inc.; and Mark W. Brennan and Arpan A. Sura of Hogan Lovells US LLP, counsel to the American Association of Healthcare Administrative Management, met with Zenji Nakazawa, Public Safety and Consumer Protection Advisor to Chairman Ajit Pai.

During the meeting, we explained that the Federal Communications Commission (“FCC” or “Commission”) can advance its telehealth agenda by expeditiously granting the Joint Petition.¹ The Joint Petition seeks two clarifications regarding healthcare-related communications under the Telephone Consumer Protection Act (“TCPA”) and the FCC’s *2015 Omnibus TCPA Order*.²

1. That the provision of a phone number to a “covered entity” or “business associate” (as those terms are defined under Health Insurance Portability and Accountability Act of 1996 (“HIPAA”)) constitutes prior express consent for non-telemarketing calls allowed under HIPAA for the purposes of treatment, payment, or healthcare operations.
2. That the prior express consent clarification in paragraph 141 and the non-telemarketing healthcare message exemption granted in paragraph 147, both in the *2015 Omnibus TCPA Order*, be clarified to include HIPAA “covered entities” and “business associates.” Specifically, each use of the term “healthcare provider” in paragraphs 141 and 147 of the *2015 Omnibus TCPA Order* should be clarified to encompass “HIPAA covered entities and business associates.”

¹ See Joint Petition of Anthem, Inc., Blue Cross Blue Shield Association, WellCare Health Plans, Inc., and the American Association of Healthcare Administrative Management for Expedited Declaratory Ruling and/or Clarification of the 2015 TCPA Omnibus Declaratory Ruling and Order, CG Docket No. 02-278 (filed July 28, 2016) (“Joint Petition”).

² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) (“*2015 Omnibus TCPA Order*”), *rev’d in part by ACA Int’l, et al. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

As we discussed, the Commission should grant the Joint Petition, and it should do so promptly, for several reasons.

The Joint Petition Complements the Commission's Telehealth Strategy.

Telemedicine promises to revolutionize healthcare by making it more accessible and affordable for patients in need. By granting the Joint Petition, the Commission can demonstrate leadership in this area and accelerate innovations in healthcare treatment and delivery. As the Commission recognized in its recent telehealth *Notice of Inquiry*, technologies that allow healthcare entities to connect instantly with rural and low-income patients promise to improve health outcomes and reduce healthcare costs.³ The same is true of the calls and text messages described in the Joint Petition, which should be an integral component of the Commission's overall telehealth agenda. Calls and texts are more ubiquitous than broadband and sometimes the only means of communications for patients in rural and underserved areas.

Healthcare delivery is undergoing transformational changes in the era of telemedicine, and physicians are no longer the only parties making the wellness, informational, and other communications patients need. Health plans, specialists, and other parties are often at the frontline of patient outreach. The Joint Petition asks the Commission to support such comprehensive approaches to patient care by making the clarifications to the *2015 Omnibus TCPA Order* described above.

Granting the Joint Petition Would Bring Significant Patient Benefits By Promoting Industry Telehealth Efforts. The data supporting phone- or text-based telehealth interventions is overwhelming. For example, many Americans do not receive recommended health tests and screenings. Among adults in the age groups recommended for cancer screenings, about two in five were not up to date with colon cancer screening, one in four women were not up to date with breast cancer screening, and one in five women were not up to date with cervical cancer screening.⁴ Empirical studies demonstrate that healthcare-related texts and calls—such as those at issue in the Joint Petition—mitigate these public health risks by improving adherence, which leads to more engaged patients, better patient outcomes, and lower healthcare costs for consumers.

Text messages, in particular, have proven effective in delivering healthcare reminders and increasing both adherence to treatment and attendance at healthcare appointments.⁵ For example, in studies among low-income urban populations, researchers found that 72.7% of parents who received text reminders brought their children in for recommended follow-up

³ See *Promoting Telehealth for Low-Income Consumers*, WC Docket No. 18-213, Notice of Inquiry, FCC 18-112, ¶¶ 9-10 (rel. Aug. 3, 2018).

⁴ *Many Americans Not Getting Routine Cancer Screenings*: CDC, HealthDay News, May 7, 2015, available at <https://bit.ly/2Ui2TO6> (citing to Stephanie Bernik, M.D., chief, surgical oncology, Lenox Hill Hospital, New York City; Louis Potters, M.D., chief, radiation medicine, North Shore-LIJ Cancer Institute, New Hyde Park, N.Y.; U.S. Centers for Disease Control and Prevention, news release, May 7, 2015).

⁵ Kati Annisto, Marita Koivunen & Maritta Valimaki, *Use of Mobile Phone Text Message Reminders in Health Care Services: A Narrative Literature Review*, 16(10) J. Med. Internet Res. e222 (2014).

vaccination appointments.⁶ Approximately 20,000 children are hospitalized annually for influenza, and an increase in inoculation rates could directly reduce that number.⁷

In study after study, researchers have confirmed the public health benefits of text-message interventions. According to a recent meta-analysis published in a leading medical journal, “[m]obile phone text messaging approximately doubles the odds of medication adherence. This increase translates into adherence rates improving from 50% (assuming this baseline rate in patients with chronic disease) to 67.8%, or an absolute increase of 17.8%.”⁸

Telehealth policy, to be effective, must include communications to consumers’ mobile phones. In 2018, 53.9% of American households relied exclusively on wireless devices for telephone service, up from 29.7% in 2010, and “more than 70% of all adults aged 25–34 and of adults renting their homes” live in wireless-only households.⁹ Wireless-only households are more likely to have numerous health challenges, such as financial barriers and substance abuse.¹⁰ Hard-to-reach populations are especially prone to use cell phones as their primary means of telephonic communication.¹¹ Other means of outreach, such as mailings and calls to landlines, are not effective in reaching most consumers, especially young people, minorities, and low-income groups, and that outreach gap leads to lower engagement and participation rates, the result of which is worsened health outcomes.

Granting the Joint Petition can help realize the demonstrable benefits of telehealth by facilitating communications that, for example:

- Explain coverage and how to get needed care;
- Perform health screenings and identify at-risk members;
- Answer questions and ensure that members have access to care;
- Facilitate selection of primary care provider and schedule appointments;
- Remind members to get preventive care, such as shots and vaccines;
- Provide support throughout a patient’s pregnancy;
- Manage chronic conditions and enroll members in care/disease management programs;
- Educate members about proper emergency room utilization;

⁶ Melissa S. Stockwell, MD, MPH, et al., *Text Message Reminders for Second Dose of Influenza Vaccine: a Randomized Controlled Trial*, 135(1) *Pediatrics* e83-e91 (2015), available at <https://bit.ly/2nL7EjC>.

⁷ See Stockwell et al., *Effect of a Text Messaging Intervention on Influenza Vaccination in an Urban, Low-Income Pediatric and Adolescent Population*, 307(16) *JAMA* 1702–08 (2012); Maanvi Singh, *Texted Reminders Help Parents Get Kids In For Flu Shots*, <https://n.pr/2KYj2Ef>.

⁸ Jay Thakkar, et al., *Mobile Telephone Text Messaging for Medication Adherence in Chronic Disease: A Meta-analysis*, 176 *JAMA Internal Medicine* 340, 340 (2016), <http://bit.ly/2GR8WCG>.

⁹ Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2017*, Div. of Health Interview Statistics, Nat’l Ctr. for Health Statistics, Centers for Disease Control and Prevention (June 2018), available at <https://bit.ly/2E0w8zg>, at 3.

¹⁰ *Id.* at 3.

¹¹ Stockwell et al., *Text4Health: Impact of Text Message Reminder–Recalls for Pediatric and Adolescent Immunizations*, available at <https://bit.ly/2rIM9rU>.

- Notify patients of changes in enrollment, disruptions in service or coverage, or other events due to non-payment;
- Facilitate transitions of care;
- Help ensure that members are filling and taking medications appropriately;
- Provide post-discharge follow-up instructions;
- Facilitate treatment adherence;
- Solicit member feedback on healthcare quality and other issues and ensure satisfaction;
- Obtain new contact information;
- Update members about benefits and/or network changes;
- Share details about plan features and programs; and
- Remind members about renewing their benefits.

In addition to improving health outcomes, these communications can give patients the support and repose they need during difficult times. For example, a recent randomized study from Temple University's Fox Chase Cancer Center examined how text messaging could potentially help women cope with the side effects of chemotherapy.¹² Women in the study received two text messages every day, one at 9 a.m. and another at 3 p.m., for four months. The study found that "[p]atients who received the text messages reported significantly lower distress over symptoms and had higher health-related quality of life at months two and four compared to a group that received only a booklet on dealing with chemotherapy."¹³ As one of the researchers noted, "[o]ne patient told us the text messages were a daily support that she did not have otherwise."¹⁴

Beyond patient care, text messages can empower rural or underserved populations by reducing the complexities of health insurance. A single parent without reliable broadband or a stable physical address, for example, may miss out on communications about important changes to his or her plan or enrollment reminders. In other settings, the compressed format of a text message could help make options more accessible to a patient than it would be with paper or email. Such improved outreach is a critical tool to avoid coverage gaps and enable informed consumer decisions. Facilitating patient-driven choice via text messages can also drive down healthcare expenses while ensuring that individuals get the treatment and coverage they need.

Reducing the regulatory impediments to phone- and text- based telemedicine by granting the Joint Petition promises to yield immediate benefits today.

There Is Bipartisan Congressional Support and Widespread Healthcare Stakeholder Enthusiasm for Granting the Joint Petition. The breadth and depth of support for the Joint Petition is hardly surprising, given the unquestionable patient benefits that phone- and text- based telehealth interventions promise.

¹² Press Release, *Text Messaging Intervention Improves Quality of Life, Lowers Distress Related to Chemotherapy in Early-Stage Breast Cancer Patients* (June 4, 2018), <https://bit.ly/2RBFKEv>.

¹³ *Id.*

¹⁴ *Id.*

The Joint Petition enjoys widespread support among healthcare stakeholders and bipartisan support from members of the House¹⁵ and Senate.¹⁶ Indeed, following the recent FCC oversight hearing in July 2018, Rep. Bilirakis submitted a question for the record asking the Commission to “provide an update regarding the Commission’s view on protecting non-telemarketing calls allowed under HIPAA in light of their unique value to and acceptance by consumers and to do so in an expedited manner via delegated authority by the Bureau of Consumer and Government Affairs or by swift Commission action so that beneficiaries’ access to health care is not jeopardized, rather than waiting for a larger ‘omnibus’ TCPA ruling that could take much longer.”¹⁷ Rep. Bilirakis’s question yet again underscores the importance of promptly granting the Joint Petition and removing the uncertainty created by the *2015 Omnibus TCPA Order* that has chilled healthcare-related communications.

Consistent with the bipartisan support among members of Congress, commenters in the FCC record are nearly unanimous in their support for the Joint Petition.¹⁸ The evidence in the record demonstrates that healthcare-related texts and automated calls lead to more engaged patients, better patient outcomes, and lower healthcare costs for consumers. For example, commenters noted that the Affordable Care Act,¹⁹ IRS Rules,²⁰ Centers for Medicare and

¹⁵ See Letter from Rep. Gus Bilirakis, *et al.* to FCC Chairman Ajit Pai, at 1 (Oct. 13, 2017) (asking Chairman Pai to act promptly to “afford clarity to covered entities and business associates making non-marketing communications that benefit patients” and observing that “helpful, important non-marketing communications can be critical safeguards to reaching underserved populations and supporting more effective, efficient health care.”).

¹⁶ See Letter from Sens. Corey Booker and Bill Nelson to FCC Chairman Ajit Pai, at 1 (Nov. 3, 2017) (noting that the calls and text messages subject to the Joint Petition convey “important medical and treatment information” and “improve patient outcomes” and stating that “time is of the essence to ensure that consumers’ access to health care is not jeopardized” and asked the FCC to “resolve these issues as soon as possible (preferably within the next 90 days) and to protect communications allowed under HIPAA in light of their unique value to consumers and their positive impact on Americans’ health and well-being.”).

¹⁷ See Question for the Record from Rep. Gus Bilirakis to the Federal Communications Commission (July 25, 2018).

¹⁸ See *generally* Comments of the Ass’n. for Community Affiliated Plans, CG Docket No. 02-278 (Aug. 26, 2016); Comments of AAHAM, CG Docket No. 02-278 (Sept. 16, 2016) (“AAHAM Comments”); Comments of CareMessage, CG Docket No. 02-278 (Sept. 16, 2016); Comments of Nat’l Ass’n. of Chain Drug Stores, CG Docket No. 02-278 (Sept. 16, 2016); Comments of America’s Health Insurance Plans, CG Docket No. 02-278 (Sept. 19, 2016) (“AHIP Comments”); Comments of Cardinal Health, Inc., CG Docket No. 02-278 (Sept. 19, 2016); Comments of AmeriHealth Caritas, CG Docket No. 02-278 (Sept. 19, 2016); Comments of Eliza Corporation, CG Docket No. 02-278 (Sept. 19, 2016); Comments of Envision Insurance Co., CG Docket No. 02-278 (Sept. 19, 2016); Comments of mPulse Mobile, Inc., CG Docket No. 02-278 (Sept. 19, 2016); Comments of Mercy Hospital, CG Docket No. 02-278 (Sept. 15, 2016); Comments of Silverlink Communications, LLC, CG Docket No. 02-278 (Sept. 19, 2016); Comments of TracFone Wireless, Inc., CG Docket No. 02-278 (Sept. 19, 2016); and Comments of United HealthCare, CG Docket No. 02-278 (Sept. 19, 2016). There were also an additional 31 comments from individuals in support of the Joint Petition.

¹⁹ See AAHAM Comments at 2 (“[T]he Affordable Care Act (‘ACA’): requires hospitals and outpatient clinics to perform post-discharge follow-up with patients; requires an insurance exchange to make a ‘reasonable effort’ to contact all applicants who provide information to the exchange that is inconsistent with the information maintained in official records; and specifically grants federal and state health and

Medicaid Services requirements,²¹ and State Medicaid Agencies²² require HIPAA-governed communications outreach. These communications are required by so many laws and regulations precisely because policymakers at several levels have recognized the unique value and public health benefits served by telehealth communications.

Granting the Joint Petition Would Further Harmonize the Commission's TCPA Approach with HIPAA. Granting the Joint Petition would support the Commission's longstanding policy of harmonizing HIPAA and the TCPA.²³ As long as the non-telemarketing call or text is made within the scope of the patient's consent and allowed under HIPAA for the purposes of treatment, payment, or healthcare operations, any party in the HIPAA ecosystem—physicians, health plans, clearinghouses, or business associates—should be able to place the communication under the TCPA (regardless of which HIPAA-regulated party initially obtained the patient's telephone number). The FCC's TCPA rules should permit the type of outreach that is already allowed under HIPAA's comprehensive privacy and data security framework.

The Commission Should Act Now. The Commission's expedited resolution of the Joint Petition is becoming increasingly necessary. It has been more than two years since we filed the Joint Petition and more than seven months since the D.C. Circuit released *ACA International*. Given the voluminous evidence on the record in support of the Joint Petition, the Commission should grant the Joint Petition promptly to facilitate the time-sensitive healthcare communications that patients want and need. Moreover, the interplay between HIPAA and the TCPA was at issue in *ACA International*.²⁴ To the extent the Commission addresses the post-ACA issues at once, it should include the Joint Petition in any such decision.

human services programs the authority to make notifications of eligibility, recertification, and other needed communication regarding eligibility by placing calls to a patient's or client's wireless telephone number.”).

²⁰ *Id.* (“[O]n December 29, 2014, the Internal Revenue Service issued final rules pertaining to 501(r) of the Internal Revenue Code (Regulations for Tax-Exempt Hospitals). These new rules require hospitals to make a ‘reasonable effort’ to notify individuals verbally and in written form about the facility’s financial assistance policy (‘FAP’) and assistance with the application process.”).

²¹ *Id.* (“Moreover, the Hospital Readmission Reduction Program provides significant economic penalties for readmissions of Medicare patients within 30 days. To comply with these requirements, hospitals are placing followup calls to patients to make sure they are aware of their post-discharge treatment plans and have access to appropriate resources.”); *see also* AHIP Comments at 6-7 (“[P]lans are required under their contracts with the Centers for Medicaid and Medicare Services (‘CMS’) to engage in enrollee care coordination and case management activities, which in many instances are conducted through telephone communications with enrollees.”).

²² AHIP Comments at 7 (“[M]anaged care organizations that contract with state Medicaid agencies to administer Medicaid benefits are required to engage in telephonic communications with members for a variety of purposes, including the provision of disease prevention information, care management services, appointments, compliance with care regimens and other wellness program related services.”).

²³ *See, e.g., Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd 1830, 1831 ¶ 187 (2012).

²⁴ *ACA Int'l*, 885 F.3d at 711-714.

Pursuant to Section 1.1206(b)(2) of the Commission's rules, this letter is being filed electronically with your office. Please contact me with any questions about this filing.

Respectfully submitted,

/s/ Mark W. Brennan

Mark W. Brennan
Arpan A. Sura
*Counsel to American Association of
Healthcare Administrative Management*
mark.brennan@hoganlovells.com
D +1 202 637 6409

cc: Zenji Nakazawa